IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 14588

UNITED STATES OF AMERICA,
Appellant,
vs.
ADOLPH G. SUTRO,
Appellee,

ADOLPH G. SUTRO,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

BRIEF OF CROSS-APPELLANT AND APPELLEE

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FILED
APR - 9 1955
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ARTS & CRAFTS PRESS, SAN DIEGO, CALIF.

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JURISDICTIONAL STATEMENT

Cross-appellant and appellee Adolph G. Sutro will for convenience herein be referred to as the plaintiff and appellant and cross-appellee will be referred to as the defendant. Plaintiff's complaint sought to recover damages sustained as a result of the negligence of the defendant and its agents. (Comp., First Cause of Action Pars. V-VII, R. pp. 9-11; Comp., Second Cause of Action, Pars. III, IV, R. pp. 12-14). It was accordingly filed under the provisions of U. S. Code, Title 28, Section 1346 (b) and Sections 2671-2680 commonly referred to as the Federal Tort Claims Act (Comp., Par. I, R. pp. 3, 4). Jurisdiction to entertain this appeal is specifically conferred upon this Court by U. S. Code, Title 28, Section 1291.

STATEMENT OF THE CASE

In 1946, plaintiff purchased some 273 acres of rich productive farm land in the San Luis Rey Valley (Comp., Pars. II, III, R. pp. 4-8). The land was bounded on the north by Camp Pendleton, a large Marine Training Center, and a natural water course known as Pilgrim Creek ran from Camp Pendleton through plaintiff's lands which were riparian to the creek (Comp., Par. IV. R. pp. 8-9). The effluent from two sewage disposal plants located in Camp Pendleton was discharged into Pilgrim Creek.

Plaintiff spent much time and effort in negotiating with the Government, endeavoring to stop the pollution, but was unsuccessful, and finally almost five years ago, on April 19, 1950, a few days before the statute of limitations would have barred his action, plaintiff filed the complaint herein.

In order to explain certain matters in the record, a rather complete statement as to the history of the case in the District Court must now be given. Defendant, after receiving an extension of time to plead, on August 25, 1950 filed a Motion to Dismiss Entire Action, to Dismiss a Portion of the Complaint, for More Definite Statement, and to Strike Matter from Pleading. This was finally heard October 13, 1950, and the motions to dismiss were denied "without prejudice to the right of the Government to make other, or further, motions at subsequent stages in these proceedings."

In its Answer filed November 1, 1950, the defendant, in addition to denying all allegations as to its negligence, denied that the District Court had jurisdiction of the action (R. p. 20), and alleged (1) that the case fell within an exception to the Federal Tort Claims Act set forth in Section 2680 (a) of Title 28, United States Code (R. p. 21) relating to "discretionary acts"; (2) that plaintiff had failed to mitigate damages (R. p. 21); (3) that the conditions complained of existed at the time plaintiff purchased

his property and that plaintiff had not actually been injured (R. p. 21); (4) that defendant had endeavored to establish additions to its sewage disposal system to satisfy and protect adjoining landowners but that plaintiff had obstructed and blocked such efforts (R. pp. 21, 22); and finally (5) that plaintiff's damage had been caused by the acts of third persons and not by the acts of the Government, (R. p. 22).

Thereafter, the defendant, pursuant to the clause above quoted from the order of October 13, 1950, filed successively a Motion for Summary Judgment, an Amended Motion for Summary Judgment, and a Renewed Motion to Dismiss for Want of Jurisdiction. Written briefs were submitted upon each of these motions, and each motion was argued orally. The defendant at all times strenuously urged that it could not be held liable to plaintiff under the Federal Tort Claims Act for the damages caused by the pollution, claiming (1) that plaintiff must name a specific Government employee who had polluted the stream, and (2) that the actions of the defendant were "discretionary acts" and were within exceptions to the Act.

Each successive motion was denied by Judge Weinberger sitting in San Diego, the last motion being denied June 25, 1953, more than three years and two months after the complaint was filed.

In view of the foregoing record, Judge McCormick, the District Judge who heard the evidence, determined with the full consent of both plaintiff and defendant that all evidence upon the question of the defendant's liability should first be introduced, that arguments thereon should be heard, and that the question of liability should be determined, and that neither plaintiff nor defendant would present any evidence as to the amount of plaintiff's damage unless and until it had been determined that the Government was liable to the plaintiff.

Accordingly, on July 16th and 17th, and 20th to 24th, inclusive, 1953, evidence was presented in San Diego before Judge McCormick, relating to the exact manner in which defendant polluted the stream, the extent and duration of the pollution, the conduct of the plaintiff and all other matters raised by the pleadings, excepting damages. Plaintiff also introduced evidence establishing that in 1946 he commenced to construct certain structures and other improvements upon the property, but that before work had progressed far he discovered the pollution of the well above referred to, which prevented living on the ranch and rendered further use of the property impossible, so that the improvements were not made in 1946, and could not be made at least until the pollution ceased in 1952. At the conclusion of this hearing, the District Court found (1) that prior to the discharge of the effluent into the creek, its waters were suitable for the irrigation of edible crops (Findings of Fact, No. 5, R. p. 39); (2) that the sewage disposal plants were negligently operated (Findings of Fact, Nos. 2, 3, and 4, R. p. 38), and that as a consequence of this negligence the waters of the creek were polluted and rendered unsuitable for irrigation of edible crops (Findings of Fact, No. 6, R. p. 39); (3) that defendant's pollution of the creek polluted a well which was located upon plaintiff's property at the time he purchased it, and also polluted another well which he dug in the fall of 1950 in an effort to mitigate damages, so that the waters of the wells could not be used to grow edible crops (Findings of Fact, No. 7, R. p. 39); and (4) that the Government negligently augmented the flow of Pilgrim Creek and caused a silting of the channel and a deposit of silt upon plaintiff's property (Findings of Fact, No. 8, R. p. 39). At this hearing it was also established that the pollution continued until July 21, 1952, over two years after plaintiff had filed his complaint, on which date the defendant finally ceased to dump the sewage

into Pilgrim Creek and instead pumped it back into another part of Camp Pendleton.

The Court concluded that the defendant was liable to plaintiff for damages for the injuries sustained.

Before the actual trial at which evidence of damages was presented, however, two additional sessions were held in Los Angeles on September 29, 1953 and on January 29, 1954, in an effort to define the issues as to damages. Finally, on March 1, 1954, the actual trial on the issue of damages commenced and continued through March 5th. Plaintiff introduced evidence establishing that because of the pollution of the well and the creek, the rental value of the property was greatly reduced, and the District Court allowed plaintiff damages for such loss for the six-year period during which the pollution continued, 1946 to 1952, in the total amount of $18,918.36 (R. p. 45). The Court further held that the improvements could have been commenced in July of 1952, and that plaintiff was entitled to recover as an item of damage the difference between the cost of erecting a repair shed, an implement shed, a help house and a storage shed in 1946 and the cost of erecting the same improvements in 1952 (R. pp. 386, 387). The amount of such increase allowed was $13,003.03.

Evidence was introduced by plaintiff of increased costs of other items which plaintiff desired to erect, such as his residence, the sewerage system for the property, the domestic water supply, and the irrigation works for the property, and the increased costs of purchasing agricultural and other equipment for use upon the property, all of which items are set forth in Plaintiff's Exhibit 50, but the District Court held that these items of increased costs could not be recovered.

Plaintiff endeavored to introduce evidence as to increased costs of still other designed necessary improvements, and of cer-

tain additional expenditures made by him in an effort to "mitigate damages," all of which evidence was rejected by the District Court. Appropriate offers of proof were made in each case.

The total of the items of increased costs as to which recovery was denied was over $78,000.00; the total of the sums spent by plaintiff to mitigate damage as to which plaintiff was not permitted to introduce evidence was $37,382.85 (R. p. 399).

Thereafter, on July 29, 1954, judgment was entered in favor of plaintiff for $31,921.36, representing the total of the two items first above mentioned.

Defendant appealed only from the judgment of the Court fixing the amount of damages (R. pp. 49, 50), and plaintiff likewise appealed only from the judgment of July 29, 1954 (R. p. 50). The record on appeal contains only the transcript of the testimony as to damages presented at the trial in March, 1954, and does not contain the testimony with reference to liability of the defendant which was introduced at the longer hearing in 1953.

Defendant "concedes the correctness of the District Court's conclusion that appellant is liable to appellee under the Federal Tort Claims Act," and further concedes that the District Court's award to plaintiff of $18,918.36 as loss of rental value is correct (Br. pp. 2, 3), and challenges only the award by the District Court to plaintiff of $13,003.03 as "increased building costs." Even here, defendant does not question the amount of the increase in building costs, but confines its attack solely to the propriety of any award.

Plaintiff contends that the District Court's award of $18,918.36 for loss of rental is inadequate, and that the District Court erred in not allowing him damages for the increased costs of the other buildings and improvements for which plans had been drawn, and in excluding evidence as to expenditures made at

the written request of the Government to minimize damages.

By stipulation filed with, and approved by, this Court, the plaintiff's reply brief to the Government's brief as appellant, and plaintiff's opening brief as appellant, are combined in this single document.

QUESTIONS PRESENTED

1. When plaintiff is prevented by defendant's negligent pollution of his water supply from living upon and proceeding to make improvements upon his property, is he not entitled under the provisions of Section 3333 of the California Civil Code to recover:

(a) The additional sums which he must now expend to make the same improvements, and to purchase the same equipment; and

(b) Sums which he expended in an effort to mitigate damages?

2. Does not the evidence as to the loss of rental value require a judgment awarding a greater sum than that allowed by the trial court?

SPECIFICATIONS OF ERROR

The District Court erred:

1. In refusing to allow damages for the increased costs, as shown by testimony in the record, of:

(a) Erecting plaintiff's residence and guest house;

(b) Installing the system to supply water for domestic and irrigation purposes, including pumps and pipe-lines;

(c) Purchasing equipment to be installed in plaintiff's repair shop for use in maintaining and operating his ranch; and

(d) Installing the sewerage system necessary to make the premises habitable.

2. In rejecting evidence as to the increased costs of:

(a) Leveling, fencing, constructing necessary roads, and landscaping plaintiff's property;

(b) Purchasing the farm machinery and equipment, including an automobile and 3 trucks for use on the premises.

As to all items in this paragraph 2, defendant made the following objections:

> "Mr. Abbott: Your Honor, I don't know whether our understanding of the other day is still applicable in this session or not, but to save time, I would like to make a blanket objection to all of the testimony of the witness relating to his intentions in 1946 or any time prior to the present date, with respect to improvements to be constructed upon the property, on the grounds that it is hearsay, it is irrelevant and immaterial. And I will request a stipulation from counsel to the effect that that objection may be deemed interposed to this whole series of questions to which it will relate." (R. pp. 343-44)

> "Mr. Abbott: Your Honor, at this time, the government would like to make a single objection, which, if counsel will so stipulate, will be applicable to all the evidence to be given by this witness, and that is this objection: That the testimony called for by the question under consideration, and all subsequent questions of this witness, is evidence inadmissible because it is irrelevant and immaterial, and does not constitute the proper measure of damages under the Tort Claims Act." (R. pp. 501-02)

As to Item (a), it made the following additional objections:

"Mr. Abbott: This probably is the appropriate time for the Government to interpose its objection. I wanted counsel to be able to lay his foundation. However, we seem to be getting into the substance of the exhibit in the matter. Once again, this is a document of recent origin, your Honor, and there has been no objective manifestation whatsoever of an intention to fence this area whatsoever. This plan, as I recall, contains about 25,000 feet of fencing, with nothing in the record at all to indicate objectively the witness' intention in the year 1946. (R. p. 374).

"Mr. Abbott: Well, we, for the record, interpose the objection that the witness' mental state in the year 1946 is not relevant or material." (R. p. 376).

"Mr. Abbott: Your Honor, we have the additional objection that there is no evidence of any kind relative to those improvements described in the last question. Not even the charts that the witness made in late 1953 contain that data." (R. p. 504).

"Mr. Abbott: Objection. It is immaterial and irrelevant, your Honor." (R. p. 504).

As to Item (b), plaintiff offered in evidence defendant's Exhibit 44-0 for Identification, a list of farm machinery and equipment, including the automobile and 3 trucks, and defendant made the following additional objection:

"Mr. Abbott: Your Honor, we will object at this point. This list appears to be of recent origin, and I think not only

is objectionable for reasons stated in our standing objection, but also because it is without the scope of the Court's ruling." (R. p. 362).

Each of defendant's objections was sustained.

The nature of each item and the increase in cost of the items referred to are set forth on pages 27A, 35A and 36A of Plaintiff's Exhibit 50; the increase in cost is summarized on lines 6, 16 and 18 of page 3A of the same exhibit, where it is shown that the cost of leveling, fencing and landscaping increased $5325.00, the cost of farm machinery and equipment increased $10,125.00, and the cost of the automobile and trucks increased $5270.00 during the period from 1946 to 1950, making the total increase in cost of these items $20,720.00. These portions of Exhibit 50 were offered in evidence at page 538 of the Record; Mr. Abbott stated that "The Government renews the objections previously tendered to that offer;" and the objection was sustained.

3. In determining the amount of damages sustained by plaintiff as a result of the loss of rental value. The preponderance of the evidence clearly establishes that the difference between the rental value of the land with an unpolluted water supply and the rental value with the water supply polluted by the defendant's negligent acts was far in excess of $18,918.36, the amount fixed by the District Court, and was, in fact, between $55,376.36 and $58,876.36.

4. In rejecting evidence as to expenditures made by plaintiff for labor, seed, sprays, fertilizer, repairs, rental of equipment, depreciation of equipment, telephone and telegraph expenses, warehouse rent, insurance, traveling expenses and miscellaneous items in the total sum of $37,382.85 which were incurred by plaintiff in an effort to mitigate damages, and which by reason of defendant's negligent acts resulted in no permanent benefit to the

property. Plaintiff's offer of proof as to these items is contained at pages 398 and 399 of the record; defandant's objection, which was sustained, was as follows:

> "Mr. Abbott: At this time the Government objects to the offer of proof on the ground that the evidence tendered is irrelevant, incompetent and immaterial, that it does not constitute evidence of damages recoverable under the Tort Claims Act, and that there has been no proper foundation laid for such evidence as evidence in mitigation of damages, or otherwise." (R. pp. 399-400)

SUMMARY OF ARGUMENT

1. The District Court correctly awarded plaintiff damages for the increased costs of erecting certain buildings for which plans and specifications had been prepared,* but which plaintiff was prevented from erecting by reason of defendant's negligent pollution of the creek. The Court should also have awarded plaintiff damages for the increased cost of erecting his residence and a guest house, including sewerage, fencing, grading and incidental expenses, since the use to which the improvements were to be put after their completion is immaterial. The Court should likewise have awarded damages for the increased costs of the irrigation system in its entirety, since this system was actually designed and was essential in 1946, and the increased costs can be ascertained with certainty. The Court should further have awarded damages for the increased cost of machinery and equipment for the repair shop as well as farm machinery, tractors, and equipment, since

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*Note: Construction had actually been commenced on certain buildings, see footnote, page 13 infra.

plaintiff actually sustained damage to the extent of the increased costs of these items as a result of defendant's conceded negligence and, under California Civil Code, Section 3333, he is entitled to compensation "for all the detriment proximately caused" by such negligence "whether it could have been anticipated or not."

2. The defendant concedes that plaintiff is entitled to recover the difference between the rental value of his property with an unpolluted water supply and the rental value with a supply polluted by defendant's act for the six-year period in question (Br. pp. 2, 3). Three witnesses offered testimony as to the extent of the damage; the District Court accepted the testimony of defendant's expert, Stanley E. Goode, Jr., which was contrary to the testimony of the other witnesses, although it was shown on cross-examination that Mr. Goode's computations (1) were based upon a supposed acreage of plaintiff's property, which was too small; (2) were based upon a false theory as to the relationship between rental values and sales values; (3) were based upon comparisons with rental values of land which did not have a comparable supply of water; and (4) were made in ignorance of actual rental figures paid for land comparable to plaintiff's and located closer to plaintiff's land than were the lands considered by Mr. Goode. The testimony of the remaining witnesses establishes that the actual loss of rental was between $59,876.36 and $55,376.36, and the District Court should have awarded this sum to plaintiff.

3. Plaintiff was specifically directed in writing by defendant to mitigate damages, and he was obliged under the law so to do. The District Court should have permitted him to introduce evidence as to the exact expenditure so made so that the propriety of such expenditures could be determined and so that plaintiff could be awarded judgment for the amount of such expenditures properly chargeable to the defendant.

ARGUMENT

I.

PLAINTIFF IS ENTITLED TO RECOVER DAMAGES EQUAL TO THE INCREASED COSTS OF ALL IMPROVEMENTS.

A. RECOVERY WAS PROPERLY ALLOWED FOR THE FARM BUILDINGS REFERRED TO IN THE JUDGMENT.

Plaintiff's position is as follows: In 1946 he purchased the property in question and commenced to make improvements. Prior to the defendant's action the waters of Pilgrim Creek and of the well were pure and wholesome (Findings of Fact 5, R. p. 39). However, plaintiff, after starting construction, discovered that the water in the well was polluted, (as was the stream, at the time he purchased the property) as a result of the defendant's negligence.* The correspondence introduced in evidence shows in part, the efforts made by plaintiff to secure a speedy settlement

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*At page 8 of its brief defendant refers to the fact that the growing of edible vegetables upon plaintiff's property had been prohibited a few weeks before plaintiff purchased the property, and states that while it does not appear in the record now before this Court, a man of plaintiff's intelligence must have known that he faced litigation and delays in occupying and using the property. Counsel preparing the Government's brief on this appeal did not try the case, and in making the statement just referred to must have been unaware that the testimony at the July, 1953 hearing established that although the creek was known to be polluted when plaintiff purchased the property, the pollution of the well was not then known. Plaintiff had started construction of the buildings, relying upon the well water for a supply of pure water for domestic purposes, and was obliged to stop operations when he discovered the pollution. (See typewritten transcript, proceed-

of this problem (see Defendant's Exhibits B1 to B23, inclusive, for example), and much of the lengthy testimony at the first session of the trial in 1953 was devoted to this point. The correspondence and this testimony established that the pollution continued from 1946 to 1952. The trial court found, and the defendant now concedes, that the defendant's negligence rendered the water of the wells and the creek—that is, all water available

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ing July 17, 1953, pages 150-153; see also Exhibits 21 and 22; see also R. pp. 354, 355).

Moreover, the Government at that hearing, in its cross-examination of Mr. Wilson, plaintiff's expert on pollution, and in much of its cross-examination of plaintiff, endeavored to prove that the pollution of the creek as a matter of fact did not pollute the well, so that it cannot now claim that plaintiff should have anticipated that the well would be polluted merely because he knew the creek was. (See typewritten transcript, proceedings July 17, 1953, pages 121-131, and July 20, pages 244-267).

The testimony at this hearing further revealed that plaintiff then expected an early cessation of the pollution of Pilgrim Creek by the Government, and never anticipated that he would be obliged to bring an action against the Government to stop the needless pollution, not only of the creek, which pollution was known when plaintiff purchased the property, but also of the well, which pollution was not then suspected. (See for example, typewritten transcript, proceedings July 20, pages 301, 302).

Clearly then, since the delay in building was caused by the unknown pollution of the well, there is no merit in defendant's present contention. If the Court believes that the allegation in defendant's brief is of importance, plaintiff, pursuant to the provisions of Rule 75(h) of the Federal Rules of Civil Procedure relating to Appeals, will ask leave to have the portions of the typewritten Transcript, to which reference has been made, printed. They were not previously printed because defendant, in its Statement of Points upon Which Appellant United States of America Intends to Rely on Appeal (R. p. 689), referred only to the *amount* of damages and did not question its liability, and it was not believed that this testimony would be material upon the issue of damages.

for use on plaintiff's property—"unfit and unsuitable for the irrigation of edible crops" and *a fortiori* unsuitable for drinking purposes (See Findings of Fact 5 to 7, R. p. 39).

Plaintiff therefore did not in 1946 complete the improvements he had begun because until the pollution stopped it was obviously impossible for him to grow edible crops upon the property or even to live on it, since there was no safe water supply for drinking or domestic purposes. Not until after the pollution finally ceased was plaintiff in a position to construct the improvements. However, in the six intervening years costs had increased greatly so that the improvements which would have cost $157,-702.00 in 1946 would cost $249,391.00 in 1952 (see Plaintiff's Exhibit 50, page 3A).

The trial court held:

> "Now, whatever he spent, whatever he has to spend now or after the nuisance was abated, in other words, after the water was not contaminated by this noxious effluent, if there is an increase in the cost of the buildings that were necessary to do the job, I think the additional cost over the estimate which he has, as indicated by the plans, drawings and specifications, is the measure of damages in the case. I think they are part of the detriment that has been caused by reason of the negligent acts of the government officers in not removing this contaminating effluent from the stream of Pilgrim Creek." (R. p. 386)

However, the Court actually gave judgment for the increased costs of only 4 buildings, and refused recovery for increased costs of the other items, stating in its Award and Order for Judgment that the damages were "found to fall in categories of uncertainty,

remoteness, infeasibleness, unnecessary, and are respectively disallowed in this action." (R. p. 46).

Defendant now concedes that the building costs actually increased by the amount of the award (Br. p. 3), but contends that the Court erred in allowing any damages for such increased costs; plaintiff contends that the Court erred in not awarding damages for the increased cost of other items, as to some of which evidence was admitted and as to some of which evidence was rejected.

The Federal Tort Claims Act provides (U. S. Code, Title 28, Section 2674):

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages."

Defendant concedes that since the pollution of the water supply by defendant occurred in California, the law of California controls, and that the applicable statute is Section 3333 of the California Civil Code, which reads as follows:

> "For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

The California law applying this statute is well stated in *Givens v. Markall,* 51 C. A. (2d) 374 at page 379:

"There is no fixed rule with respect to the measure of damages for the wrongful injury or destruction of property. Each case must be determined on its particular facts. It is said in 15 America Jurisprudence, page 514, section 106, in that regard:

" 'There is no fixed rule for determining the measure of damages for injuries to, or destruction of, property in every case. The amount to be awarded depends upon the character of the property and the nature and extent of the injury, and the mode and amount of proof must be adapted to the facts of each case. In ascertaining the damages to be allowed, the jury may consider all the circumstances connected with the injury.'

"In the last-cited authority, at page 515, section 107, it is further said:

" 'One whose real property is injured by another's wrongful and negligent act is entitled to such damages as will compensate him for the injury or loss sustained. No hard and fast rule can be laid down, however, for the measurement of those damages; whatever rule is best suited to determine the amount of the loss in the particular case should be adopted . . .' "

In *California Orange Co. vs. Riverside Portland Cement Co.*, 50 Cal. App. 522 (1920), dust emitted from defendant Cement Company's plant blew across plaintiff's orchard, causing serious injury. The trial court allowed damages for (1) loss of crops during the three-year period that the nuisance continued, (2) the cost of additional labor necessitated by the nuisance, and (3) the

loss of future crops after the abatement of the nuisance. In affirming the judgment of the trial court, the District Court of Appeals, relying upon and quoting Civil Code, Section 3333, said at page 530:

> "The measure of plaintiff's damage is the amount that will compensate it for all the detriment proximately caused by defendant's wrongful operation of its plant, from the time it commenced operations in January, 1910, until it installed the 'treator' in January, 1913."

The Court concluded that the plaintiffs were entitled to recover for the increased costs of operation of the grove during the years subsequent to the abatement of the nuisance, caused by damage arising from the dust.

In the Cement Company case, the defendant was held liable for increased *operating* costs arising from its tortious conduct; in the case at bar, the District Court has held defendant liable for certain increased *capital construction* costs arising from its tortious conduct. The holding of the Cement Company case clearly justifies the award of the District Court herein.

None of the authorities cited by the defendant is contrary to these cases. The decisions referred to by defendant merely state the general rules of damages, particularly with reference to causation, but none of them holds that increased construction costs necessary to complete a project may not, under proper circumstances such as here exist, properly be an item of damage.

Defendant states that its position "is based upon two lines of reasoning"—(1) that defendant did not "proximately cause" the increased cost, and (2) that the item is too remote and speculative (B., p. 6).

The fallacy of this argument is apparent. Suppose plaintiff

had followed the course suggested by defendant in its brief, and had erected his residence and made the other improvements in 1946. Defendant has conceded that the water supply was polluted and remained so for 6 years as a result of its negligence. Not even the defendant would contend that plaintiff could have lived in his residence during that period; no Board of Health would even have permitted him to do so. But if defendant's theory is correct, plaintiff should have erected the six buildings and installed the pipes, pumps and machinery referred to on the blueprints and other documents (see Plaintiff's Exhibits 38, 39, 44A to 44M inclusive) and in the Report of the American Appraisal Company (Plaintiff's Exhibit 50) at a cost in 1946 of $157,702.00, knowing that he could not use any of the property, and not knowing how long this condition would continue to exist. Actually, the situation would have continued for more than 6 years until the defendant in July, 1952, finally ceased negligently polluting the creek. Obviously, plaintiff could not have left the buildings and valuable machinery unattended for this time, so a watchman on constant duty would have been required. When the pollution finally ceased, plaintiff would have lost (1) six years' interest on the money invested, (2) six years' taxes on the improvements, (3) six years' depreciation (and depreciation on unused machinery and vacant buildings is exceedingly great), and (4) the wages of a watchman for 6 years of 365 days each, or 2190 days, or 52,560 hours. The last item alone at $1.00 per hour amounts to $52,560.00.

The defendant on various occasions advised plaintiff of the obligation upon him "to minimize damages." See, for one example, Defendant's Exhibit B6, a letter from the Public Works Officer of the Eleventh Naval District to plaintiff dated September 20, 1946, in which he specifically called plaintiff's attention to "the general legal principle requiring persons under certain

conditions and circumstances to 'mitigate damages'," and stated that "it would appear that it would be to your best interest to proceed along such lines as would be considered to be in compliance with said general principle of law." Had plaintiff erected the improvements and put in a claim for the items above enumerated, the defendant would now contend (and probably correctly) that plaintiff had no right to increase his damage by such conduct.

Would any member of this Court as a reasonable prudent man invest $157,000 in property which was being contaminated by sewage effluent until the negligence which caused the contamination ceased? Or could plaintiff, or any member of this Court, in 1946 have anticipated that by 1952 the cost of making the improvements would have increased as greatly as it did?

The measure of damages allowed by the Statute is "the amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not" (California Civil Code, Sec. 3333). Plaintiff is now in process of completing the erection of the improvements so long since started; he is actually being damaged by the increased cost. He was in no way responsible for the increased cost. Defendant, whose fault alone caused the loss, should compensate him for it.

Clearly, then, the award of the District Court for the increased cost of erecting the 4 buildings referred to in the Court's judgment should be affirmed.

B. PLAINTIFF SHOULD ALSO RECOVER THE INCREASE IN COST FOR THE OTHER IMPROVEMENTS AS TO WHICH EVIDENCE WAS INTRODUCED.

The District Court permitted plaintiff to introduce evidence as to the increase in the cost of erecting the residence and guest house, the sewerage system, the domestic water supply and irri-

gation works, including the irrigation pumps, and the machinery and equipment to be installed in the maintenance and repair shop. However, in its final judgment, it disallowed damages to cover these increases. Recovery for each item should have been allowed.

1. *Recovery should be allowed for the increased cost of erecting the residence.*

"Immediately after the purchase of the property" plaintiff had prepared an entire group of plans for various structures (R. p. 342). These plans were all marked as portions of Plaintiff's Exhibit 44 and the individual sheets were further designated by letters and subsidiary numbers.

Exhibits 44I-1, 44I-2 and 44I-3 are three blueprints constituting a part of this series prepared in 1946 for the residence in which Mr. Sutro intended to live with his mother (R. p. 354). Exhibit 44I-4 represents specifications for the residence prepared later in 1946. Plaintiff had actually commenced construction of the residence as well as the shop when he learned of the pollution of the well (R. p. 354, 355); and at the trial he testified that and he still intended to construct it (R. p. 355). (The construction is in process at the present time.)

Mr. Burlake, plaintiff's expert witness on building costs, was able from the plans and specifications to determine what the cost of the residence would have been in 1946 and what it would have been in 1952 (R. p. 501-503). Defendant's expert appraiser, Mr. Vaughn, was also able to make estimates of the cost in these two years (R. p. 658, 659).

The plans were definite; the amount of increased costs can be definitely ascertained; and the only reason for denying the recovery, apparently, was the belief of the District Court that plaintiff could not recover because the building was to be used as a

home and not for business purposes (R. p. 387, 388).

Analysis shows that recovery for this item of damage should have been allowed, for plaintiff is not seeking to recover any sentimental value. That value is lost forever and no Court can ever make plaintiff whole for that loss. The years of his life since January of 1946 are gone beyond recall, and no judgment of this Court can turn back the hands of the clock or grant plaintiff the joy of which he has been deprived, of living in a home of his own upon this property in the years following 1946.

What plaintiff seeks to recover is not the sentimental value of living in this home, but rather the hard dollars and cents difference between the cost of constructing the home in 1946 and the cost of constructing it in 1952. Assuming that all the structures had been built in 1946, and that the Government had negligently burned them all to the ground, could it be argued that the Government was bound to rebuild only the farm buildings and not the residence merely because plaintiff lived in the residence? Obviously a 2x4 costs as much in place in a residence as in any other building, and a fire insurance company pays its losses upon residence property just as it does upon commercial property, based upon insurable value and not upon sentimental value.

Or, suppose again that the buildings had all been erected, and that the Government sought to condemn them to enlarge Camp Pendleton. Could it be said that the plaintiff would be entitled to no compensation for the taking of his residence merely because it was his residence? To state the argument is to answer it—and just as the defendant in a condemnation action is entitled to the fair market value of his dwelling equally with the fair market value of his store or factory, so in the case at bar Mr. Sutro is entitled to the difference between the cost of erecting his residence in 1946, according to his plans then prepared, and the cost of erecting it in 1952.

Or, again, suppose that all the buildings had been erected, and defendant had actually dumped its polluted sewage into the various buildings, requiring each of them to be rehabilitated in order to be used again. There could be no legitimate distinction between plaintiff's right to recover for the damages to his residence in such a case and his right to recover for the damages to his other buildings.

The foregoing argument is naturally strengthened—if any added strength is necessary—by the fact that the residence was to be used as an office for farm purposes and was planned to contain plaintiff's safe, drawing-board, technical library, maps and business papers, etc., and was also equipped with a utility room for farm purposes and a freezer room to store farm produce and supplies (R. pp. 472-474).

The increase in cost of the residence should therefore have been included in the judgment.

2. *Recovery should be allowed for the increased cost of erecting the guest house.*

The foregoing argument applies to the guest house. The blueprints for this building were designed at the same time that those for the residence were, and were introduced in evidence as plaintiff's Exhibits 44J and 44J-1. Plaintiff testified at the trial that he still intended to erect this building (R. p. 357). (It is part of the construction underway when this brief is written.) It is referred to as Building No. 4 in plaintiff's Exhibit 50. For the reasons above stated, plaintiff has been damaged to the extent that the cost of erection in 1952 of this guest house exceeds the cost of erecting it in 1946, and this amount likewise should have been included in the judgment.

3. *Recovery should be allowed for the increased cost of installing the sewerage system.*

The Court can take judicial notice of the fact that a residence in a rural area requires a septic tank and sewer system. The plans for such a system are shown on plaintiff's Exhibit 44N. While the lines showing the specific pipes and equipment were not placed upon the ground plan until 1953, the plans for the residence which were prepared in 1946, included 2 bathrooms, and the plans for the guest house and help house also prepared in 1946 included bathrooms, all of which obviously required some sewer connections. When, as in such a case, the particular items were clearly required in 1946 to make the premises habitable, the important factor is not: were precise plans drawn in that year, but rather can the amount of plaintiff's damage as a result of the defendant's wrongful conduct be ascertained with any accuracy. Mr. Burlake testified that his estimate was based upon construction in accordance with the requirements of the San Diego County Health Department, and the increased cost of such a system could therefore readily be determined, (R. p. 504). This increase is, therefore, a proper item of damages.

4. *Recovery should be allowed for the increased cost of installing the domestic water supply system.*

Plaintiff's Exhibit 44M, prepared in 1946, shows in detail the plans for the water system to supply plaintiff's buildings with a domestic water supply. The buildings would, of course, be unusable without such a system. Neither defendant's nor plaintiff's witnesses had any difficulty in ascertaining the increased cost of construction, and for reasons previously advanced recovery of this increased cost should have been permitted.

5. *Recovery should be allowed for the irrigation system in its entirety.*

Plaintiff concedes that the documents introduced in evidence as plaintiff's Exhibits 38 and 39, which show in minute detail the pipelines, reservoirs, and irrigation system, were not prepared until 1953 (R. p. 147, 151, 156.). However, this does not mean that the increased cost of installing the system should not be allowed.

Since an irrigation system in a semi-arid area is as essential to profitable farm operations as a septic tank and sewer system, the important fact is not whether the precise plans and blueprints in evidence were created in 1946. The two questions which alone require answering are: (a) was the system actually intended in 1946, and (b) if so, can the increase in the cost of that system be ascertained with any accuracy. The evidence establishes that each question must be answered affirmatively, and it therefore follows that the increase in costs is a proper item of damages.

(a) *The system was actually intended and planned in 1946.*

Mr. Tedford and Mr. Sutro both testified as to conversations late in 1945 and early in 1946, between Mr. Sutro and representatives of the Soil Conservation Service with reference to the irrigation system and the dam (R. pp. 95, 96, 146, 177). Mr. Sutro wrote various letters, beginning December 12, 1945, at a time when the purchase of the property was still in escrow and before the deed to it had been recorded, and continuing into early 1946, which were introduced in evidence (Plaintiff's Exhibits 35 and 37) in which he specifically referred to the fact that the plans were being prepared for an irrigation system and requested information about pumps from pump manufacturers, etc. (R. p. 137 ff).

Indeed, he testified that he consulted them so often that he finally was ashamed to request more information from them (R. p. 157).

Plaintiff purchased the property for the purpose of growing vegetables (R. pp. 148-150). He regarded the system previously used by his predecessors in interest as inefficient (R. p. 136). He testified to the characteristics of the system he planned to install. It includes pumps of relatively small size which operate 24 hours a day, filling two reservoirs and a dam so that quantities of water as large as several irrigators can handle can be turned on to the fields and so that a surplus of water will be available in time of hot, dry winds, which will enable the entire area to be irrigated rapidly when necessary to save a valuable crop which may be lost if water can be applied only as fast as it can be pumped (R. pp. 159, 160). The system is specifically designed to operate economically—to secure the lowest possible electric stand-by charges and power rates, to utilize labor most efficiently, and yet to secure the lowest possible crop insurance premiums.*

The red lines on Exhibit 39 indicate the drainage system to reclaim the 18 acres of alkalied land (R. p. 162, 163), referred to *infra,* page 37, the blue lines on Exhibit 38 indicate concrete irrigation pipes, and the brown lines steel irrigation pipes (R. p. 147).

Defendant objected to the introduction in evidence of these exhibits upon the ground that they were not prepared until 1953; however when plaintiff was asked why he did not "put those

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*Since the trial in March of 1954 almost all of the irrigation system has been installed in accordance with these plans; it will be entirely completed before this case is decided by this Court. If the Court believes this to be an important factor, recovery of the amount here involved could be made contingent upon such actual completion, and the case could be remanded to the District Court in order that evidence of the facts could be introduced and judgment rendered accordingly.

lines on a map in 1946" he replied:

> "Why, I might answer that by saying that this irrigation system is so simple, we did put it on paper. We put it on paper regularly, frequently. It never seemed necessary to draw it out on a map. After all, the calculations in regard to pipe friction, pump activity, (*sic*) lift, capacity of dams and things, are not too involved.
>
> "We would make the calculations, send the inquiries to the pump people, and then pray that the Navy would go through with whatever was their current plan. Then when that was changed, we would do that all over again. They were merely work sheets. The actual delineations of these pipelines, your Honor, is really nothing.
>
> "I might say that having had a moderate degree of success in organizing construction crews. We built that entire ice rink, with the exception of the piping layout of my refrigeration engineer, and the only plans we had were stuff drawn on the back of a couple of envelopes, and you could build several irrigation systems for the cost of that project." (R. pp. 167-168)

The last statement refers to plaintiff's previous testimony (R. p. 131), regarding his experiences in designing the ice rink at Sutro Baths, San Francisco, which he formerly owned and operated.

Plaintiff also testified that he had drawn up numerous plans, but couldn't find them anywhere and that he had spent 3 days unsuccessfully trying to reconstruct the plans from the fragments which he could find (R. pp. 155-156). He concluded at page

156 of the Record:

> "The only solution that seemed fair and reasonable was then to produce the minimum plan which would give a satisfactory irrigation system and use that as a basis. There is no representation in the slightest that this plan was made in 1946."

Had the plaintiff in 1946 believed that litigation with the Government was necessary, or would ensue, or had he foreseen the increases in building costs, he would have carefully preserved the drawings which he had prepared. In any event, the foregoing summary of his testimony, and his testimony in its entirety, especially the correspondence in 1945 and 1946, together with the testimony of Mr. Tedford of the Soil Conservation Service, to which we have previously referred, establish beyond the shadow of doubt that an irrigation system was definitely planned in 1945 and 1946, even though the plans then drawn were of "the back of an envelope" type which could not be produced in 1954 at the trial, so that the more formal plans prepared in 1953 were the only ones introduced in evidence.

The irrigation system was an indispensable part of the ranch and of Mr. Sutro's plans, and the acts of the defendant precluded its construction in 1946. The increased cost of construction in 1952 should therefore be included in the judgment to be rendered by this Court.

(b) *The increase in costs can be ascertained with certainty.*

Mr. Burlake testified that from the data submitted to him by Mr. Sutro he could ascertain the details of the irrigation system

(R. pp. 508, 524, 525). That is, distances could be determined by scaling the maps, sizes of pipe were indicated, the specifications of the dam were set forth in Exhibit 40 which was the paper prepared by the Soil Conservation Service in 1949 (R. p. 161), etc. Mr. Vaughn, defendant's expert on construction costs, testified without apparent difficulty as to his computations of the increase in cost of constructing the system in 1952 over 1946 (R. p. 660) and stated that he was able to make his estimates from the information contained on the documents furnished him (which were the Exhibits in the case), assisted in some cases by information received from Mr. Burlake as to specific costs and other matters where it was easier to use Mr. Burlake's report than to compute the details from the Exhibits (R. pp. 655, 656). This indicates that there is no ambiguity in the plans, and that the actual detriment suffered by Mr. Sutro as a result of delay in the construction of the irrigation system occasioned by defendant's wrongful conduct can readily be determined.

The defendant did not show that the system was extravagant or included any unnecessary items. There is no reason, therefore, why the judgment should not include the increased cost of its construction.

6. *Recovery should be allowed for the machine tools.*

Plaintiff throughout his life has worked with tools and during the period when he owned and operated the Sutro Baths & Ice Rink he personally maintained the meters, regulating devices and some of the heavy machinery (R. pp. 127-136; especially 135). In 1946, when he laid out the plans for the buildings on the property here involved, he included a repair shop to house machinery to be used to repair ranch equipment and for other pur-

poses (Plaintiff's Exhibit 44D, R. p. 347). (The trial court included in its judgment an award for the increase in the cost of erecting this shop; R. p. 46). The shop was specifically designed to house the tools, and the blueprints for the building plainly showed designated locations for the various machine tools for which the increased purchase cost is now claimed. The shop was partially erected at the time of trial (R. pp. 353, 662, 663). Plaintiff's past experience with machines and tools indicates why he desired a fairly complete shop—first, to maintain his farm machinery properly and economically; second, to experiment on new farm devices, such as the automatic irrigating device concerning which he testified (R. p. 133); and third, to work on inventions in various other fields, such as his self-braking trailer (R. p. 133) and his originally designed world's record-breaking hydroplane (R. pp. 128, 129) which he piloted as holder of United States Seaplane License No. 1 (R. p. 130).

Plaintiff's Exhibit 44G contains a list of the brand names of the tools to be installed in the locations designated for them in the plans. This list of brand names was prepared in 1953 but it represented the same quality of tools that plaintiff had expected to purchase in 1946, except where the tools were of a cheaper quality. None was of a better quality (R. pp. 349, 352). Certain small items are included in this list which were not shown on Exhibit 44D, such as hand tools to be used with the lathe which is designated on Exhibit 44D; however, as Mr. Sutro stated, the lathe would be useless without these tools to use in conjunction with it (R. pp. 381-383) and the main items are all set forth on the blueprint which was prepared in 1946.

Defendant devoted much time to cross-examining plaintiff as to the need for such a shop and such extensive equipment (R. pp. 437-442), and argued that because not every ranch in the

San Luis Rey Valley had such items their cost should not be considered. However, whether the shop and tools therein are those which an average farmer would have is immaterial. To return to the analogies mentioned in the case of the residence, if the machine shop and tools had been in existence and had been destroyed by fire, or had been condemned by defendant, or had been damaged by sewage, the Government would be liable for the detriment sustained by Mr. Sutro as a result of its actions, even though not another farmer in the United States possessed such a building or such tools. Surely America has not reached the condition where an individual who has been damaged by another individual, or by his own Government, can recover only the value of an "average shop," or the value of tools "customarily used by an average farmer," regardless of his actual loss. The question is not, what is the difference in cost of the hypothetical average shop and average tools from 1946 to 1952; but rather, what is the increase in cost between 1946 and 1952 of erecting the particular shop Mr. Sutro designed, had started to erect, and has now practically completed, together with the cost of purchasing and installing in it the specific tools for which it was especially designed in 1946.

To a man of Mr. Sutro's background, tools were vital. He had designed a specific building to house his specific tools as he wished them housed. He had shown on the building plans the size and the nature of each tool. While no brand names of tools were specified in 1946, Mr. Sutro testified that the tools on the list appraised by Mr. Burlake were in the same relative price and quality range as those he intended to buy in 1946, and would have bought but for the Government's actions. The remainder were cheaper. Here, as in the case of the septic tank, the presence or absence of a list of brand names prepared in 1946 is not the question. The question is the right of plaintiff to recover for the damage proximately caused by the increase in the price of the

tools during the period the pollution continued, which increase in price constituted part of the "detriment proximately caused" him by the defendant's wrongful conduct.

Everything in Mr. Sutro's testimony, both on direct examination and on cross-examination, indicated without question that the tools were at all times to be installed in the building, and that some of them had already been purchased at the time of trial. More tools have since been purchased as the building program has progressed far enough so that they may be placed upon the property with safety, and may be used by Mr. Sutro, for the purposes for which they were at all times intended; here, as in the case of the irrigation system, this Court, if it so desires, can request the District Court to take additional evidence as to the actual purchase of the tools.

The judgment rendered herein should have contained as one item the sum by which the purchase price of the tools increased between 1946 and 1952.

C. THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE AS TO THE INCREASED COSTS OF CERTAIN ITEMS.

As previously noted, supra, page 8, the District Court refused to permit the introduction in evidence of what plaintiff intended to do in 1946 with reference to the erection of fencing. The record shows that plaintiff was permitted to testify that he intended to grow vegetables on part of the property, and to graze cattle on the remainder, which would require fences and gates to keep the cows out of the vegetables; that he did not actually prepare a plan for the fence in 1946 because he felt that a fence to keep a cow out of a vegetable patch could be built without a blue-

print or technical engineering research, and that in 1953 he prepared such a plan which was offered in evidence as Plaintiff's Exhibit 47 (R. pp. 373, 374). The defendant's objections to receiving this exhibit are quoted supra, page 9; the Court itself at pages 375 to 377 of the Record raised other objections, and at page 378 excluded the evidence.

When Mr. Burlake was interrogated at page 504 with reference to the cost of landscaping, land leveling, grading, curbs, fencing, etc., Mr. Abbott's objections (quoted supra, page 9) were very general; the Court itself rejected the testimony upon the ground that Mr. Sutro had not testified concerning these items (R. pp. 505, 506), although the reason he had not so testified was because the Court had previously sustained objections to such testimony. The evidence in Mr. Burlake's report as to the increased cost of these items was formally offered in evidence (R. p. 538), and was rejected.

With reference to the farm machinery to be used upon the property, Mr. Sutro testified that he purchased the property to operate it at a profit and for the purpose of growing vegetables for which farm machinery and equipment were necessary. He did not prepare an itemized list in minute detail of such equipment in 1946 because "it would be too simple, when the time came to purchase it, to bother about making up the list right then," but he had since prepared a list (R. p. 362). This list is Plaintiff's Exhibit 44-O for Identification, and was prepared in 1953. Defendant's objection to plaintiff's testimony concerning the list (quoted supra, pages 9, 10) was sustained, and plaintiff's offer of proof by Mr. Burlake of the increase in cost of the items referred to therein was rejected (R. p. 538).

Clearly, in each case the Court erred, first, in not even permitting Mr. Sutro to testify to the nature of the fence, the equipment, etc., which was necessary for the proper operation of the

ranch, why it was necessary, when he determined upon its location, or upon the particular item of equipment, etc.; and second, in rejecting evidence of the increased cost of the items upon the ground that there was no detailed evidence as to what was involved. Obviously, at least a certain amount of fence, one or more tractors of some particular type, and certain other minimum items of equipment are necessary to operate any commercial farm.

Moreover, for the reasons presented, supra, page 31, with reference to the machine tools, the real question is not, did plaintiff *need* the fence, farm equipment, etc. The question is, had he actually planned to install or purchase these items. If he had, then he has been damaged to the extent of the increase in cost of such equipment. Plaintiff should have been permitted to present evidence concerning his plans, subject to cross-examination by the defendant. The District Court and this Court could then properly determine whether the items concerning which such testimony was offered were proper, and whether the increased cost of such items should have been included in the award of damages.

To exclude all evidence with reference to the items, and thus preclude plaintiff from establishing that they were at all times included in his plans for the development of his property, was clearly error.

D. THE AMOUNT OF THE INCREASE IN COSTS IS CLEARLY ESTABLISHED.

The qualifications of Mr. Burlake of the American Appraisal Company are abundantly clear from his testimony at pages 485-500 of the record. The District Court, in its award allowing damages of $13,003.00 for the increased cost of the repair shop, implement shed, help house and storage shed, adopted his precise figures as set forth at pages 6A, 9A, 19A and 20A of Plaintiff's

Exhibit 50.* His computations of the increase in cost of the re-

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*A word of explanation as to Plaintiff's Exhibit 50 may assist the Court. As we have noted, defendant contended up to and including the session of the trial in July, 1953, that it had a right to pollute Pilgrim Creek (see, for example, its Renewed Motion to Dismiss Plaintiff's Complaint, which was denied in June, 1953, also see R. pp. 244-247). Therefore, even after the defendant ceased to dump the effluent into the Creek in 1952, plaintiff did not feel justified in commencing construction, since he feared that the Government might resume the pollution at any time. Not until the District Court in July, 1953, held that the defendant was liable to plaintiff for any damages he sustained did plaintiff feel justified in proceeding with any improvements.

In the latter part of 1953, in preparation for the trial to determine the exact amount of plaintiff's damages, plaintiff requested the American Appraisal Company to determine the increase in costs of various items between 1946 and July, 1953, the date of the session at which defendant's liability had been declared. As indicated in the letter from the Appraisal Company to Mr. Sutro, dated January 29, 1954, which is contained at the beginning of Plaintiff's Exhibit 50, the original report of the company was completed January 29, 1954. On that very day, however, the District Court, in one of the sessions referred to, supra, page 5, held that "the date of the installation of the new project"—i.e., July 21, 1952—"is the date for the fixation of damages" (typewritten Transcript of proceedings, January 29, 1954, p. 56, ll. 2-7; see, also R. pp. 336, 337). Accordingly, plaintiff requested the Appraisal Company to determine the difference in costs between 1946 and July 21, 1952. This second computation was completed February 19, 1954, as indicated by the letter of that date which follows the January 29th letter at the beginning of Exhibit 50. In order to avoid retyping the details of construction on the original pages which compared 1946 costs with 1953 costs, the new figures without the detailed explanations were placed on additional sheets following the 1953 figures. For example, the cost figures for the residence for 1952 were all placed on page 13A following pages 10 to 13 inclusive, which defined exactly what was included in each item. Mr. Burlake testified to the procedure followed at pages 493 to 495 of the Record. The figures used throughout this Brief are the 1952 figures contained in the supplemental pages.

maining items, as set forth in Plaintiff's Exhibit 50 at the pages noted below should likewise be adopted, and the judgment of the District Court should be increased by adding the following items:

Residence building, Page 13A	$18,926.00
Guest house, Page 16A	2,076.00
Sewerage, Page 22A	1,247.00
Fencing, landscaping and miscellaneous improvements, Page 23A	5,325.00
Domestic water supply, Page 24A	2,740.00
Irrigation work, Page 27A	16,280.00
Irrigation pumps, Page 29A	1,831.00
Shop machinery and equipment, Pages 32A and B	14,866.00
Farm machinery and equipment, Page 35A	10,125.00
Automobiles and trucks, Page 36A	5,270.00
TOTAL	$78,686.00

II.

PLAINTIFF'S LOSS OF RENTAL VALUE WAS IN EXCESS OF $55,000.00.

The District Court computed plaintiff's loss of rental value as follows:

"The items included in the award are as follows:

"Loss of rental value on 56.55 acres at $60.00 per acre for a six-year period, 1946 to 1952	$20,358.00
Loss of rental value on 25.80 acres at $40.00 per acre for a six-year period, 1946 to 1952	6,192.00
Loss on rental value on 18 acres at $10.00 per acre for a six-year period, 1946 to 1952	1,080.00
TOTAL	$27,630.00
Estimated crop receipts during six-year period, 1946 to 1952	$ 8,711.64
Total Loss of Rental	$18,918.36"

R. p. 45.)

The foregoing computation is erroneous because it is computed (a) on too small an acreage, and (b) at too low a rental per acre.

A. THE ACREAGE FIGURES USED BY THE DISTRICT COURT WERE TOO SMALL.

The District Court's judgment is based entirely upon the testimony of Mr. Goode, defendant's expert witness, who testified that he did not include "18 acres of alkali ground in the flat, which is physically capable of irrigation, but not included within the above irrigated land classification due to its alkaline condition." (R. p. 567.)

This area should have been included. Clarence P. Tedford, who was for many years Chief of the Soil Conservation Service in Fallbrook, within which District plaintiff's land is located, and who had been on plaintiff's property numerous times and who had made a survey of soil types and had prepared a soil map of the property (R., pp. 80, 81; Plaintiff's Exhibit 33), testified that the 18 acres which had been alkalied by an excess of water (which excess incidentally was caused by the negligence of defendant in discharging silt into Pilgrim Creek, as alleged in plaintiff's second cause of action) could be drained (R. p. 93). He further testified that this operation "would probably take a year; maybe two years" and that "I don't think your alkali conditions are going to be too bad, too hard to correct them." (R. p. 94.)

Mr. Sutro testified that he had always intended, and still intends, to reclaim this land (R. p. 166). The time for reclamation now is obviously at least as long as the time for reclamation in 1946 would have been had the Government's tortious conduct terminated at that time. Therefore, while the 18 acres of alkalied land could not have been used for vegetables for X months

during the period of reclamation, it will now take X months in the future to make it usable, and the period of use of which plaintiff is deprived is therefore the same as with the other land. Since no claim is being made against the Government for the cost of reclaiming this land (except for the *increase* in cost of installing the sump and drainage system necessary for the reclamation; the sump has been installed since the trial) it is no concern of the defendant whether the cost of reclaiming the land is, or is not, economically justifiable. (See, in this connection, the argument under heading I, B, 6 supra, page 31, to the effect that plaintiff was entitled to recover for the machine tools even though those tools might not have been purchased by the so-called "average man"). Hence, Mr. Goode's testimony that the cost of reclaiming the land would, in his opinion, be high is immaterial.

Moreover, the rental value of vegetable land with soil of the quality of this soil is so high in this vicinity (see discussion infra, pages 43, 44 of testimony of the witnesses as to value) that the cost of reclaiming the land would be justifiable even though it was several times as much as it actually is.

It follows, therefore, that the irrigable acreage to be considered is approximately 100 acres from 1946 to 1950, instead of the 82 acres considered by the District Court.

In 1950, in an effort to mitigate damages, plaintiff dug a second well in a different location from that of the well on the premises at the time he purchased the property, hoping to obtain an unpolluted supply of water so that he would be able to occupy his ranch; at the first trial it was determined that this well, too, was polluted because of the defendant's acts (see R. p. 201), and hence the water could not be used. However, the evidence showed that the added supply of water, if unpolluted, would have permitted the irrigation of an additional 50 acres of land which had never before been irrigated. (See R. pp. 187-189; Plaintiff's Ex-

hibits 41, 42.) Although counsel for defendant cross-examined plaintiff at great length, and inquired about the capacities of the wells (see, for example, R. pp. 401-403), the testimony as to the adequacy of the water supply to irrigate the additional acreage is uncontradicted; and the Government on this appeal has conceded liability for polluting the supply. Therefore, the District Court further erred in failing to include the additional 50 acres of land for the years 1951 and 1952 in its computation of damages.

B. THE RENTAL VALUE PER ACRE ALLOWED BY THE DISTRICT COURT WAS INADEQUATE.

Mr. Goode testified to the valuations given by the Court in its award above quoted, but did not place any value upon the loss of rental of the additional 50 acres above referred to, and considered the land temporarily unusable due to alkali conditions caused by the high water table only in its then condition, without allowance for the increased rental value which it would have had as soon as the alkali had been removed.

Mr. Anderson, plaintiff's expert witness, testified that the rental value for all of the bottom land and the mesa land (the 100 acres above mentioned, including the alkalied land) was $100 per acre per year for the entire period (R. pp. 254, 255), and that after the year 1950 the additional area of 50 acres above mentioned with an unpolluted water supply would have had a rental value of $75 per acre per year (R. p. 255). The difference in value was caused, in part, by soil conditions and in part by the fact that the latter land, unlike the first 100 acres, had not previously been irrigated and was rolling in character so that some additional expenditures would be required. $100.00 per acre for 100 acres is $10,000 per year or $60,000 for six years; $75.00 per acre on 50 acres is $3,750.00 per year, or $7,500 for two years.

The total rental value of the property with an unpolluted water supply would therefore, on Mr. Anderson's figures, be $67,500.

Mr. Sutro testified that he had investigated rentals in the general area of his property (See, infra, pages 48 and 49), and basing his testimony upon his own knowledge of his land and upon this investigation testified that the rental value of the property with an unpolluted supply would be $70 per acre in 1946, $75 per acre in 1947, $85 per acre in 1948, and $100 per acre in 1949, 1950, 1951, and 1952. He applied these values to the 100 acres prior to December, 1950, and to the 150 acres after January, 1951. The total rental on these figures, on one hundred acres up to 1950 and on one hundred and fifty acres for 1951 and 1952, would be $63,000.

1. *The Valuations of Mr. Anderson and Mr. Sutro Should Be Accepted.*

(a) *Mr. Goode's appraisal is weak and should not be relied upon.*

Mr. Goode's appraisal should not be relied upon for the following reasons:

(1) Many pages of the record are devoted to a lengthy statement by Mr. Goode as to the extent of his investigation. However, most of his work was along channels which could not assist him in forming an opinion as to the fair rental value of the property. For example, he secured an abstract from Land Title Insurance Company, consisting of some 40 pages of entries (R. p. 598), and examined "the deeds that I cared to inspect" (R. pp. 553, 554). There were about 40 of these deeds (R. p. 599), al-

though each page of the abstract had some 50 or 60 entries (R. p. 598) and Mr. Goode never explained the process he used in selecting the particular deeds for further examination. He also obtained offerings or list prices on other properties from various real estate dealers (R. pp. 562, 563, 599). From this information he endeavored to determine the sales prices of the various properties considered. This work might assist him in forming an opinion as to the market value or the sale price of the Sutro property, but it would in itself give him no information as to the rental value of that or any other property, and he admitted that "there wasn't a single lease recorded" in the abstract which he examined (R. pp. 554, 604).

However, Mr. Goode testified that he determined the ratio between sales price and rental price (R. p. 561), and that the ratio was 10 to 1 (R. p. 581). The time Mr. Goode spent in obtaining this evidence and in preparing the elaborate map, Defendant's Exhibit DD, is an indication of the importance he placed upon this portion of his investigation, and the extent to which his opinion was based upon it. Yet, on cross-examination, he admitted that he had only two instances in which he had both a lease price and a sales price for the same property, one instance in which he had an actual lease and an offer to sell, and one instance in which he had a sales price on an entire 4,000 acre parcel which included three separate leases in addition to much other property (R. pp. 607, 608). No one, however expert he may be, can form a general rule of any validity based upon three or four isolated cases, and the fact that Mr. Goode believed that he had sufficient information to enable him to do so and relied upon such a presumed rule in itself detracts from the value of his testimony. Particularly is this true when he stated that sales prices might be affected by many factors, such as closeness to highways and market centers, which would not affect rental values for agri-

cultural purposes (R. p. 603). An opinion based in part upon a line of reasoning such as the foregoing is not entitled to great weight.

(2) Twenty leases, or almost two-thirds of those considered by Mr. Goode, involved leases by the Government of portions of Camp Pendleton property not used for military purposes. These are shown by the numbers L-9 and L-11 to L-29 inclusive on Mr. Goode's Exhibit, Defendant's Exhibit DD (R. p. 608). Mr. Goode testified that Camp Pendleton extended some 20 miles north of plaintiff's property and that many of the leases examined by him affected property too distant from plaintiff's property to be shown on Exhibit DD (R. p. 600). Moreover, Mr. Goode admitted on cross-examination that these leases all had clauses which (1) restricted the amount of water which the lessees could use, and (2) gave the Government the right to cancel them upon thirty days' notice without payment for any crop losses sustained by the lessees as a result of such cancellation! (R. p. 609). Mr. Goode further admitted that tenants under these leases would sometimes rent 3 or 4 acres of land, and only irrigate 1 acre, putting the total water allotment for 3 or 4 acres upon 1 crop to grow the crop, and that this would affect the rental value of the property (R. p. 609). Even with these restrictions, however, 8 of the 16 Camp Pendleton leases for irrigated crops (Frazee, 3 leases; Singh, 2 leases; Beggs, 2 leases; and Rathwish) provided for rent at the rate of $45 per acre; one (also Singh) for a rental of $41.20 per acre; two (another to Beggs and 1 to Boehm) for $40 per acre; three (Castro, Contreras and another to Beggs) for $35 per acre; one (another to Boehm) for $34 per acre; while the lowest rent of the entire 16 (another lease to Boehm) was $25 per acre (R. pp. 618, 619). Mr. Goode frankly stated:

"However, I can state this, that on the Pendleton leases that I considered that every one of them was short of water . . ." (R. p. 622).

Yet these were the leases which he used in computing the rental value of plaintiff's land, on which the plentiful supply of water was not even challenged!

Mr. Goode conceded that the cost of water would have to be added to his rental figures and that he did not know what that cost was (R. p. 619). Even without adding this amount to the rental, under 8 of the 16 Camp Pendleton leases for irrigated land, the rental price paid per acre of land for which an adequate supply of water would be available (one-third of the acreage under lease because of the water restrictions) on Mr. Goode's figures would be $135.00 per acre (three times $45). The lowest rental of vegetable land at Camp Pendleton *subject to a thirty-day cancellation clause* would be $75 per acre (three times $25). We submit that, when the amounts testified to by Mr. Goode are actually paid for vegetable land subject to the restrictions enumerated, the fair rental value of plaintiff's land without such restrictions and with an adequate supply of up to six acre feet of water per acre per year at low cost (see discussion of testimony of Mr. Anderson, infra, page 47) is obviously more than $60 per acre, the figure advanced by Mr. Goode and adopted by the Court for 56.55 acres, and is far in excess of $40 per acre, the figure adopted by the Court for 25.80 acres, or $10 per acre, the figure adopted by the Court for 18 acres of the alkalied land.

(3) Mr. Goode inquired about rentals at the Pankey Ranch, which he admitted was 10 miles from Mr. Sutro's property (R. p. 601), and at other points too distant to be shown on the map (Defendant's Exhibit DD) as shown by the location of the numbers designating these leases at the extreme edges of the map,

with arrows pointing in the directions of the property. (R. pp. 599, 600) However, he was not aware (R. p. 629) of the rentals paid by Mr. Alvarado, Mr. Delphy and the other individuals whom Mr. Sutro contacted (see infra, page 48), who rented land in the San Luis Rey, Vista, and Oceanside area, within a five-mile radius of the Sutro property (R. p. 601), including two leases on property which bordered Foss Lake on the side opposite Mr. Sutro's property (Murillo, R. p. 328; Faucett, R. p. 330). In other words, he missed the most important sources of information, and depended, for the most part, upon leases of land which were not as comparable to Mr. Sutro's land as were the sources relied upon by Mr. Anderson and Mr. Sutro.

(4) Even more damaging to Mr. Goode's testimony was his admission that he would not change his opinion even if he knew that land in the immediate vicinity of Mr. Sutro's land was renting, and had rented, for sums in excess of $100.00 per acre (R. pp. 629, 630). The fact that such prices had been paid, and were being paid, was most material to a determination of the rental value of the Sutro property, and would be wholly inconsistent with Mr. Goode's appraisal of $60.00 to $65.00 as the fair rental value, since Mr. Goode admitted that the soils in the portion of the Sutro property which he classified as irrigable were good. (He classified much of it, for example, as Hanford sandy loam (R. p. 614), one of the finest soils in California. This soil is the only soil in Western San Diego County which is given a rating of 100 by Dr. R. Earl Storie in his "Classification and Evaluation of the Soils of Western San Diego County" (University of California, College of Agriculture, Agricultural Experiment Station, Berkeley, California, Bulletin 552, June, 1933, page 32, referred to R. pp. 614, 615). It is in effect the yardstick by which other soils are measured. And Mr. Goode admitted that Dr. Storie was

"the best soil man in the United States," and that he would "not question anything that Dr. Storie says" (R. p. 615).

(5) Mr. Goode admitted that the cost of water was a vital factor in determining rental values (R. p. 610), yet he had not even endeavored to ascertain the cost of water on either the Sutro property or the other properties whose rental values he did ascertain (R. p. 611). He conceded that the Sutro property had an adequate supply of water, and did not challenge Mr. Sutro's or Mr. Anderson's testimony to that effect, but made no investigation as to the adequacy of water supplies of the other properties—although, as has been noted, he admitted that the supply for the Camp Pendleton leases, upon which he relied so heavily, was definitely inadequate.

(6) He admitted that the cost of labor was also an important factor in determining rental value (R. p. 610), yet he did not determine the labor costs on the various properties he considered (R. p. 611).

(7) He admitted that the rental value of any property would be greater if it had a system including a storage dam and reservoir which would enable the entire property to be irrigated rapidly in time of dry, hot winds than it would be if there were no such system (R. p. 611), yet he did not determine whether the pipe sizes and storage capacity of the irrigation systems installed upon the rental properties which he considered were comparable to Mr. Sutro's system (R. p. 611).

(8) Mr. Sutro had prepared plans for a complete irrigation system, including a dam and two reservoirs which would enable him to irrigate the property in the most economical method pos-

sible, using large volumes of water for relatively short periods of time (See R. pp. 159, 160, 222-225, 233-235). (The 6,500,000 gallon dam and 977,000 gallon reservoir are now completed.) However, Mr. Goode, in forming his opinion as to the rental value of the Sutro property, considered its value with the ancient system installed by Mr. Sutro's predecessors and not with the new system including the dam and reservoir (R. pp. 612, 613). It is apparent from the exhibits and correspondence, much of it written in 1946, that the improvements were to, and would have been, made in that year, and at costs then prevalent, but for defendant's acts, and that the rental value of which Mr. Sutro has been deprived is the rental value of the property as so improved. In this connection, it should be noted that plaintiff is not making any claim for the rental value of the buildings to be erected upon the property, but merely for the rental value of the land with the efficient irrigation system Mr. Sutro would have installed but for the pollution.

(b) *Mr. Anderson's Testimony Is Entitled to Great Weight.*

Mr. Anderson has had a long experience in actual selling and leasing of property in the San Luis Rey Valley. He is familiar with leases in the immediate vicinity of the Sutro property, including the Davies property which is "on the same road going up to the Sutro property" (R. p. 266), the Stokes property (R. p. 265) which is "right below" the Sutro property and adjoins Foss Lake (R. p. 268), the Winston property (R. p. 266) which is 4 or 5 miles from the Sutro property (R. p. 269), and other properties much closer to Mr. Sutro's property than the lands considered by Mr. Goode. Mr. Anderson confined his investigation to comparable properties, and did not spend his time obtaining information with reference to properties which were not comparable,

which information could only confuse the issue. His testimony was based, not upon rentals of Camp Pendleton property subject to cancellation clauses and restricted water rights, requiring the leasing of three acres to obtain enough water for one acre, nor upon rentals on property 10 miles from the Sutro property, but upon the properties most likely to be comparable to the Sutro property.

Neither did Mr. Anderson attempt to base his opinion upon an alleged co-relation between sales prices and rental prices. Much of the cross-examination (see R. p. 263) was directed to his information as to the sales prices of specific pieces of property—presumably the sales investigated by Mr. Goode. For the reasons already stated, information as to such sales would not be a benefit in forming an opinion as to rental values, but would only tend to obscure the true issue.

Mr. Anderson, in arriving at his opinion, considered the all important matter of water costs—*and his assumptions in this connection stand unchallenged in the record.* He took into consideration the uncontradicted testimony that the prices paid for water by adjoining owners ranged from $10.00 to $25.00 per acre-foot (R. p. 274), while the water costs on the Sutro property would be only $4.00 per acre-foot because of the efficiency of the Sutro irrigation system (R. p. 274). Mr. Sutro testified that the pumping costs would be $1.58 per acre-foot for the approximately 100 acres of lower land, and $2.77 per acre-foot average for all the land, including the high land which he would have irrigated after 1950 (R. p. 173). This testimony stands without contradiction in the record, although the depth of the draw-down in the wells, the height to which the water was to be pumped, the size of the pipes and even the specifications for the pumps were all available to defendant so that if plaintiff's computations were incorrect that fact could readily have been established (see

Plaintiff's Exhibits 41 and 42). (This testimony, of course, indicates why plaintiff wished to install this particular system because, as he testified, the use of small pumps operating 24 hours a day, filling reservoirs which could later release large quantities of water rapidly whenever needed, resulted in outstanding operating economies. (See R. pp. 159, 160, and 234, 235.)

Mr. Anderson recognized the fact that a rental of $100.00 per acre for land, coupled with three to six-acre feet of water per acre at $4.00 or less per acre-foot (making the total cost for land and water $112.00 to $124.00 per acre, depending upon the amount of water used), is more attractive to a tenant than a rental of $85.00 an acre, coupled with three to six-acre feet of water at $10.00 to $25.00 an acre-foot (making the total cost for land and water $115.00 to $235.00 per acre, depending upon the amount of water and the price per acre-foot) (R. pp. 273-275). The logic behind this reasoning is uncontrovertible—and requires the conclusion that the reasonable rental value of plaintiff's property was, as Mr. Anderson testified, at least $100.00 per acre per year.

(c) *Mr. Sutro's Opinion Is Likewise Entitled to Respect.*

Plaintiff himself testified as the owner of the property as to its rental value. The method which he followed in forming his opinion was very simple. He asked a number of neighboring tenants and landlords what rental they were paying or receiving for their property (R. pp. 322ff); examined their leases personally (R. p. 330); ascertained the cost of their water (R. p. 333); made allowances for differences in water costs and other possible differences between their properties and his (R. p. 335); and then determined the comparable value of his own property (R. p. 335). Defendant did not challenge the method employed by Mr. Sutro,

nor did it indicate any weaknesses or errors therein. It should be noted that, in making his estimate, plaintiff charged his own land with water costs on twice the amount of water which he charged to the other properties (R. p. 335).

Mr. Sutro's familiarity with power costs, pumping systems, the most efficient manner of irrigating property, the water requirements of various crops, and the other factors which should be considered in forming an opinion as to the rental value of property, as shown by all of his testimony, give to his opinion a weight far greater than that which would normally be given to the opinion of a landowner.

To summarize the testimony upon this point: Mr. Goode's opinion was distorted by a consideration of immaterial and misleading factors, and was not based upon the directly material and important considerations. Mr. Anderson and Mr. Sutro relied upon directly comparable and relevant factors, and took into consideration water costs and rentals actually paid in the general and immediate vicinity. The judgment of the District Court should have been based upon their testimony, and the District Court erred in not finding in accordance with their testimony that the rental value of the property for the period in question with an unpolluted supply was between $63,000.00 and $67,500.00; the figures to which Mr. Sutro and Mr. Anderson, respectively, testified.

C. THE DISTRICT COURT'S COMPUTATION OF DRY FARM RENTAL WAS INCORRECT.

Mr. Anderson testified that with a polluted supply the greatest net income on the property would be received from dry-farming barley on a share-crop basis of one-quarter of the crop. The average price per sack from 1946 to 1952 was $2.90; the

high productivity of the soil would produce 15 sacks to the acre, netting the owner 3¾ sacks to the acre, or $10.87 per acre per year (R. p. 257). For 100 acres, this would be $1,087.00 per year, or $6,522.00 for six years, or $7,609.00 for seven years. On the 50.72 acres hereinabove referred to, which would have been irrigated from the second well if the supply of that well had not been polluted during the years 1951 and 1952, the receipts would be $1,102.64. The total dry farm income would thus be $7,623.64 for six years, or $8,711.64 for seven years. However, the District Court apparently by reason of a mathematical error, computed the estimated receipts "during six year period, 1946 to 1952" at $8,711.64 (R. p. 45). Only $7,623.64 should be deducted from the rental which would have been received for the property with an unpolluted supply, even assuming, as the District Court did, that plaintiff should be charged with the theoretical maximum return for a dry farm operation.

Deducting this figure of $7,623.64 from the actual rental value of the property with an unpolluted supply of water ($67,500 according to Mr. Anderson, supra, page 39, and $63,000 according to Mr. Sutro, supra, page 40) the actual net loss of rental suffered by Mr. Sutro for the six-year period, 1946 to 1952, was between *$59,876.36* and *$55,376.36,* and the judgment of the District Court should have included this amount.

III.

THE DISTRICT COURT ERRED IN EXCLUDING EVIDENCE AS TO EXPENDITURES MADE BY PLAINTIFF IN AN EFFORT TO MITIGATE DAMAGES.

The general rule with reference to mitigation of damages is stated as follows in *Kleinclaus* v. *Marin Realty Co.,* 94 Cal.

App. 2d 733 (hearing denied by the Supreme Court) at page 739:

> "The reasonable cost involved in mitigating damages is always recoverable, provided it does not exceed the damages prevented or reasonably anticipated. (4 Rest. Torts, sec. 919; 15 Am. Jur. Damages, Sec. 27, p. 423, Sec. 147, pp. 554-555; 8 Cal. Jur., Damages, sec. 43, p. 783.) It is obvious that one by his wrongful act cannot cast on another the necessity of expending money to prevent or mitigate damages and escape liability for the reasonable cost thereof."

This same rule is stated as follows in 25 C.J.S. at page 531:

> *"Legitimate expenses incurred in a prudent endeavor to reduce the damages, even though the intended object was not accomplished, may be recovered.*
>
> "As a general rule, a party is entitled to all legitimate expenses that he may show to have been incurred by him in an honest endeavor to reduce the damages flowing from or following the wrongful act. . . . Neither does it affect the right to recover that the object intended was not accomplished, provided the expenses were reasonably and prudently incurred. . . ." (Italics added.)

As we have noted, supra, pages 19, 20, plaintiff was expressly admonished by the Government, in writing, to mitigate damages in accordance with this principle of law. He endeavored so to do by performing work upon the property to prevent erosion; he was obliged to store equipment which would later be required; he was forced to take certain trips in connection with the contentions of the Navy Department, etc. Under the rule above noted, plaintiff was entitled to recover sums reasonably expended by him

in such an effort. Counsel for plaintiff at page 398 of the record stated:

> "Mr. Cranston: Your Honor, for the sake of the record I would like to ask Mr. Sutro certain questions as to expenses which he incurred."

The Court then said:

> "The Court: Why don't you make an offer of proof, instead of asking him, because it will take up time in cross-examining him, and all of that."

Plaintiff then offered to prove that he had been forced to expend $37,382.85 for items specifically referred to in the offer, from which no permanent benefit was obtained. The defendant's objection, quoted supra, page 11, was sustained.

The next day, plaintiff returned to this point with reference to one of the items above mentioned, and asked Mr. Sutro specifically how much he had spent for labor in preparing to grow crops in 1946 (R. pp. 468, 469). The defendant again objected "on the grounds previously stated," and the objection was sustained.

Here, again, plaintiff should have been permitted to introduce evidence as to the exact expenditures made. To cite an example, because of the hilly nature of portions of the property, plaintiff was obliged to take steps to prevent erosion during the period the land could not be used for growing vegetables. If such steps had not been taken, there would have been permanent damage to this portion of the land for which the defendant would be liable. Money spent by plaintiff for labor in discing the land, etc., for seeds, sprays, and fertilizers to prevent this erosion was

included in the offer of proof. Moreover, the Court refused to permit plaintiff to answer the specific question as to how much he had spent for such labor in 1946. The Court should have permitted plaintiff to show exactly what was done, and how much he spent; then it could have determined whether the expenditures were justified under the rule with reference to mitigation of damags above set forth. To exclude evidence of *all* expenditures made by plaintiff made it impossible to determine whether the expenditures, or any of them, came within the rule permitting their recovery.

CONCLUSION

All the testimony reveals, and the District Court expressly found (Finding of Fact No. 9, R. pp. 39, 40), that plaintiff had at all times cooperated with the defendant and done everything he could to remedy a situation which was caused by the needless, wrongful conduct of the defendant. Plaintiff was willing to do anything to develop and use the property provided that he received some assurance from the Government that the increased costs incurred by him as a result of whatever action he took would not be wholly wasted because of some subsequent action of the Government. Whenever he was asked to cooperate with some definite plan of the Navy, he endeavored to assist.

The defendant, however, although it alone was the wrongdoer, and although it now concedes that it alone was wholly responsible for the situation, and although it could have remedied the situation at any time, did not actually do anything even to alleviate the situation until 1952—two years after the complaint had been filed in this action.

As a result of the defendant's wrongful and deliberate actions, needlessly continued over a period of many years, plaintiff, who

himself had done no wrong, has been damaged very seriously financially, in addition to suffering losses upon which no monetary value can be placed. The relief afforded plaintiff by the District Court is wholly inadequate. Plaintiff asks merely for compensation for a portion of the damage he has actually suffered.

The judgment of the District Court on the measure of damages should be reversed and, on the basis of evidence already in the record, plaintiff should be awarded damages of $58,876.36 for loss of rental value of the property, instead of the $18,918.36 allowed by the District Court; and damages of $70,969.00 for increased costs of the improvements as to which evidence was actually admitted, instead of $13,003.03 as allowed by the District Court. The case should then be remanded to the District Court with directions to that Court (1) to receive the evidence which was offered by plaintiff and rejected as to the increased costs of the fencing, farm machinery, etc., and as to the sums expended by plaintiff in an effort to mitigate damages, and (2) to enter judgment for plaintiff for the additional sums the Court determines upon the basis of such evidence are necessary to compensate plaintiff (a) for the increase in cost of such items, and (b) for the amounts necessarily and reasonably expended by plaintiff in an effort to mitigate damages.

Respectfully submitted,

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